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Energy for Life.

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Public Comment on Final Report
Interagency Ocean Policy Group
White House Council on Environmental Quality
722 Jackson Place
Washington, DC 20503

Re: Comments on the Final Report of the United States Commission on Ocean Policy

Dear Sirs:

Cape Wind Associates, LLC ("Cape Wind") hereby submits its comments on the Final Report ("Report") of the U.S. Commission on Ocean Policy ("Commission"). Cape Wind commends the Commission for this ambitious undertaking, and offers the constructive suggestions set forth herein. Most importantly, however, we urge the President to clarify that any new provisions would not adversely affect the few offshore renewable energy projects that are already under active development and permit review. We also urge that any recommendations proceed in a manner consistent with Executive Order 13212, "Actions to Expedite Energy-Related Projects." We look forward to active participation in any future proceeding that may occur as a result of the Report.

I. The Cape Wind Project.

Cape Wind has a particular interest in ocean issues, as it is proposing the nation's first offshore wind energy project, which would be capable of generating up to 420 MW of clean and renewable energy. The wind farm would be located entirely in federal waters, with only a portion of the submerged transmission cable buried beneath the coastal seabed of Massachusetts. The Cape Wind project has been undertaken in direct response to the policy directive of the Massachusetts Legislature in the Electric Restructuring Act of 1997, which mandates minimum amounts of renewable energy and declares the "public purpose" of "generating the maximum economic and environmental benefits over time from renewable energy to the ratepayers of the Commonwealth…." According to the marginal emissions rates published by ISO-New England, the introduction of Cape Wind's energy into the NEPOOL system would offset approximately one million tons of CO_2 each year, making Cape Wind the region's most meaningful proposal to address the issues of greenhouse gas and regional air quality, while fostering an important breakthrough in American energy independence.

Cape Wind is now in the fourth year of a comprehensive and exhaustive environmental review process conducted jointly by Federal and State regulatory agencies, which includes seventeen participating agencies. This joint review will result in an Environmental Impact Statement under the National Environmental Policy Act ("NEPA"), which defines the most comprehensive environmental review standard under Federal law, as well as an Environmental Impact Report under the Massachusetts Environmental Policy Act ("MEPA"). Cape Wind is also undergoing a separate adjudicatory proceeding before the Massachusetts Energy Facilities Siting Board regarding the requisite transmission facilities that would be located within Massachusetts. The current review process thus considers all relevant concerns and issues in a seamless manner, with absolutely no "gap" between federal and state review.

II. The Report Appropriately Recognizes the Significant Potential of Offshore Renewable Energy Sources, and that U.S. Industry has fallen Behind.

Cape Wind agrees emphatically with the Report's conclusions that (i) "environmental, economic and security concerns have heightened interest among many policymakers and the public in renewable sources of energy," and (ii) the "potential is significant and could include offshore wind turbines" and other types of offshore renewable energy. Further, the Report correctly concludes that the American offshore industry is now "looking increasingly to the lead of European countries such as Denmark, the United Kingdom, and Germany, where growing numbers of offshore projects are being licensed." Report at 318 (emphasis added). Thus, while wind energy has emerged to become the world's fastest-growing source of electrical generation, the European nations have seized the global lead in establishing a robust offshore wind industry, with the associated gains in their technology and manufacturing sectors. Cape Wind feels strongly that the United States must move quickly in order to gain a competitive position in this rapidly developing industry and, most importantly, we must do so in a way that does not harm the very few American projects that are already underway.[1]

III. The Commission Appropriately Recognizes the Need for Greater Support for Offshore Renewable Development.

Cape Wind concurs with the Commission's conclusion that, in light of the important benefits presented by offshore renewable development, additional project support and funding is consistent with the National interest, as follows:

> Congress should use a portion of the revenues the federal government receives from the leasing and extraction of Outer Continental Shelf (OCS) oil and gas to provide grants to all coastal states for programs and efforts to enhance the conservation and sustainable development of renewable ocean and coastal resources.

[1] Notwithstanding the contrary suggestion at page 319 of the Report, to our knowledge there are only two American offshore wind energy projects under active development and permit review. Indeed, "proliferation" of offshore renewable energy projects has only occurred in the European markets, with the United States already having fallen a full decade behind in this emerging global industry.

Id. at 313 (emphasis in original). Such rationale is also consistent with the will of Congress in providing market support to renewable energy projects pursuant to the production tax credit in Section 45 of the Internal Revenue Code, as well as the market support structures established under State law, including renewable portfolio standards.

IV. The Report Properly Calls for the Streamlining and Expediting of the Permitting Process for Offshore Renewable Energy Projects.

Cape Wind, which is now in the fourth year of a comprehensive permitting review, fully concurs with the Commission's conclusion that it is necessary to streamline and expedite the review process for offshore renewable energy projects. More specifically, the Report concludes that, under current law, "the Nation runs the risk of unresolved conflicts, unnecessary delays and uncertain procedures," such that there is a need "to avoid gridlock and allow progress" and to "streamline the process" for offshore serviceable energy facilities. Id. at 320. These observations are also entirely consistent with the established Administration policy reflected in Executive Order 13212, "Actions to Expedite Energy-Related Projects," which recognizes the need "to take additional steps to expedite the increased supply and availability to our nation" and thus directs each Federal agency to conduct its statutory review of proposed energy facilities in an expedited manner, as follows:

> The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.
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> For energy-related projects, agencies shall expedite the review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

If the nation is to gain the potential benefits of offshore renewable energy development, the current permit review process should be streamlined and expedited, and project opponents should not be allowed to use deliberate and undue delay as a means to block viable renewable development.

V. The Report Mischaracterizes the Comprehensive Review Process for Offshore Renewable Energy Projects under Current Law.

The Report is simply incorrect in its suggestion that the current review of offshore renewable energy projects does not "weigh the benefits of the nation's energy future against the potential adverse affects on other ocean users, marine life, and the ocean's natural processes…." Id. at 320. The Report also incorrectly states that the permitting authority of the ACOE under current law "primarily regulates obstructions to navigation." Id at 318. To the contrary, the current law and regulations, including both the Rivers and Harbors Act and the National Environmental Policies Act, provide for the most comprehensive form of Federal regulatory review, which is in no way limited to issues of navigation. Thus, regardless of whether Congress ultimately decides to restructure the existing statutory structure, there should be little question that the current regulatory process is sufficient to evaluate all issues associated with projects now under review.

The regulations of the Corps, long-established regulatory practice and an extensive body of case law all confirm that the Corps' current jurisdiction over offshore structures is extremely comprehensive and in no sense limited to issues of navigability. Indeed, the Corps' regulations confirm that its regulatory review under Section 10 involves a comprehensive "public interest" balancing standard, as follows:

> The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 CFR § 320.4(a)(1) (emphasis added). Further, in United States v. Alaska, 503 U.S. 569, 580-583 (1992), the Supreme Court upheld the foregoing comprehensive environmental review standard and specifically rejected the view that the Corps' review should turn primarily upon navigability issues. Moreover, in the case of Cape Wind, the Corps has determined that an

Environmental Impact Statement ("EIS") pursuant to NEPA is required, and the comprehensive review of issues required thereunder (specifically including the consideration of alternative technologies and locations and potentially conflicting uses) is now in its fourth year. Thus, the Report is incorrect in suggesting that the review process under current law is not sufficiently "comprehensive" to properly evaluate and balance all concerns regarding any proposed offshore project, or is focused solely or primarily upon navigational issues.

Such conclusion is shared by the leading environmental advocacy organizations. The Environmental Defense Fund in its comments to the House Subcommittee on Energy & Mineral Resources regarding H.R. 5156 argued that "there is no urgent need, and there is no valid justification" for alteration of the current law regarding the permitting of offshore wind facilities, as follows:

> The present jurisdictional authority over project involving … wind and wave energy has not been shown to be flawed and in need of repair. The Federal government presently has clear authority to review, permit, and provide appropriate regulatory oversight for projects of this kind. There has been no evidence of demonstrable flaws in the current permitting system.

Comments to Subcommittee re. H.R. 5156 (7/24/02, emphasis added.) With specific reference to the Cape Wind project, the Conservation Law Foundation and Union of Concerned Scientists by letter to the Corps dated August 16, 2002, similarly concluded that the Corps' authority under Section 10 is sufficient to conduct a meaningful review of, and to authorize, Cape Wind's pending proposal:

> Section 10 of the Rivers and Harbors Act, together with the National Environmental Policy Act, provide clear authority to conduct comprehensive environmental review process and to issue permits for [Cape Wind's offshore data tower] and ultimately, should it be appropriate, for a wind farm. CLF is the region's advocate for a better-developed resource management and regulatory frame work for the marine environment. At the same time it is the position of the CLF and UCS that the Section 10 and NEPA processes can and should be used to produce good offshore wind energy sitting decision in the near term.

The National Resources Defense Council similarly issued a position statement concluding that consideration of Cape Wind's pending application can and should proceed pursuant to the existing avenues for review and participation, as follows:

> Meanwhile, projects like Cape Wind must obtain an Army Corps of Engineers permit pursuant to Section 10 of the Federal Rivers and Harbors Act. In addition, the Cape Wind project has voluntarily committed to undergoing an environmental review process in Massachusetts. (NRDC would oppose any proposed project that does not similarly commit or meet all requirements of the relevant state(s') environmental review process.) Pending more comprehensive Federal legislation, the existing combination of Federal and State processes should be used to evaluate the environmental merits of proposed wind power sites and to assure appropriate mitigation for any environmental impacts that might be identified.

NRDC Position Statement on Offshore Wind, October 8, 2002 (emphasis added). Thus, regardless of whether Congress ultimately chooses to restructure the existing statutory scheme, there should be no doubt that the current review process is sufficiently comprehensive to address any and all concerns regarding pending offshore proposals, and is certainly not limited to navigation issues.

VI. Centralized Government Planning is Not Appropriate for the Offshore Sector of the Deregulated Electric Industry.

The Report's fundamental criticism of the current permitting process for offshore renewable energy facilities is the fact that it does not impose a centralized planning regime to predetermine the potential sites where projects may be proposed (i.e., it "is not based upon a comprehensive and coordinated planning process.)" Id. at 318. Centralized planning, however, is not appropriate for the newly deregulated electric generation industry, which has been restructured for the specific purpose of fostering entrepreneurial innovation and initiative and to move away from centralized governmental planning of new generation projects and potential sites. For example, the Massachusetts Electrical Restructuring Act of 1997 included an express legislative declaration of "the public purpose of generating the maximum economic environmental benefits of renewable energy" in the competitive energy marketplace, with the Legislature specifically anticipating that these "public purposes" will be fulfilled through the innovation of private industry. M.G.L.c. 164 §§ 4E. As explained by its primary draftsmen, the Massachusetts Electric Restructuring Act of 1997 specifically intended such a result, as follows:

> The Commission should be aware that this current siting process as memorialized in statute, reflects a conscious and carefully considered legislative policy. The Act purposely and thoughtfully directed the generation industry away from centralized government planning in order to foster entrepreneurial thinking and innovation. Experience demonstrates that the Commonwealth will best realize the benefits evolving from new approaches when entrepreneurial proposals are not precluded by bureaucratic predeterminations or presumptions as to what energy facilities will be most consistent with the public interest.
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> The Cape Wind project is the direct result of the reformed siting law and the state's commitment to renewable energy sources.

Letter of June 7, 2004, of John Binienda, Chairman of the Joint Committee on Energy of the Massachusetts Legislature, and Daniel Bosley, Chairman of the Joint Committee on Government Regulations of the Massachusetts Legislature, to the United States Oceans Commission (emphasis added). The FERC has similarly restructured the wholesale electrical industry with objective of opening the generation sector to the innovations and efficiencies that result from free enterprise, rather than centralized planning.

The Federal and State governments have thus deliberately left the primary role of proposing new generation facilities and their locations to the innovation of industry, subject to comprehensive public interest review under both Federal and State law. Thus, the Report's fundamental premise regarding renewable energy projects, i.e., that we should revert from the new entrepreneurial model back to a centralized planning model, is directly contrary to the stated policy objectives of the newly deregulated electrical generation industry.

VII. The United States Should Proceed Carefully in Proposing New Provisions for "Property" Interests and Governmental Compensation for Offshore Renewable Energy Projects.

The Report correctly notes that, under current law, offshore renewable energy facilities are authorized by permit, rather than through the granting of "leases" or other "property interests." Further, Congress has seen fit to provide for the authorization of the non-extractive structures on the Outer Continental Shelf (including such structures as gas pipelines, extensive electric and telecommunications facilities and cables, radio towers, and ocean thermal energy conversion projects) without generally requiring compensation in the form of rental or other payments. For example, in recognition of the special policy benefits and challenges of developing new renewable energy resources, the Ocean Thermal Energy Conversion Act (42 USC 9101) provides for the Federal permitting of non-extractive thermal energy projects on the OCS, but does not require any lease arrangements or royalties to the Federal government. To the contrary, such act makes available special financial assistance for the construction and operation of ocean thermal energy projects. In contrast, the Outer-Continental Shelf Lands Act (OCSLA) provides for royalty payments pursuant to "mineral leases" that authorize the extraction, purchase and sale of submerged oil, gas and mineral deposits.

Cape Wind does, however, recognize that the ability to obtain an easement interest (in addition to the current permit authorization under current law) would provide a somewhat more durable and traditional form of interest, which could provide additional certainty to the lending community for renewable and other offshore industry sectors. Nonetheless, in light of the important public interests supporting the development of new renewable resources, it is important that any new and additional expenses to be assessed against such projects not be so large or uncertain as to discourage capital investment in these newly developing industries.

VIII. The Federal Government has Recently Addressed Many of The Same Issues in Developing its Interim Policy for Siting Wind Farms on On-Shore Public Lands.

On October 16, 2002, the Bureau of Land Management of the Department of Interior issued its new Interim Wind Energy Development Policy, Inst. Memo No. 2003-020 (the "BLM Policy"), for the siting review and authorization of private wind farm proposals on on-shore public lands, a process that considered many of the same policy concerns now raised by the Commission. The BLM Policy found that "the President's National Energy Policy encourages development of renewable energy resources, including wind energy, as part of any overall strategy to develop a diverse portfolio of domestic energy resources for our future." Most importantly, the BLM Policy shares many of the key attributes of the review process for offshore wind projects under current law, including primary dependence upon private industry (and not centralized governmental planning) for the identification of proposed sites for commercially viable wind energy development on public lands.[2] Specific provisions of this BLM Policy include the following:

> • **Applicant's Identification of Proposed Sites**. Although the BLM considered authorizing on-shore wind farms on public lands pursuant to a centralized planning processes, the BLM Policy instead decided to rely primarily upon "first come" review of individual applications at proposed sites designated by commercial project proponents. The BLM specifically concluded that such "processing of wind energy right-of-way applications on a first come basis is consistent with the President's National Energy Policy and will encourage the access to public lands for renewable energy resource assessments and development."
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> • **No Disruption of Pending Applications**. It also determined that, in order to avoid disruption of ongoing project reviews, "pending applications will be processed consistent with the guidance provided by [the BLM Policy] prior to the acceptance of new applications for the same lands."

[2] It is thus puzzling that the Report commends the "well established DOI regulatory program for onshore wind," yet criticizes the existing process for offshore wind primarily because of its comparable lack of a centralized governmental planning process to predetermine potential wind project sites. Most importantly, both systems properly rely primarily upon private industry for the identification of potential sites for commercially viable wind projects on public land.

> • **Applicant Capability**. Further, in order to discourage the potential for land speculation, the BLM Policy provides for a review of the applicant's technical and financial capability and further provides for authorizations to lapse if not pursued in a timely manner with due diligence.
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> • **Expedited Review Process.** The BLM Policy provides that, in recognition of the pressing need to develop alternative energy sources, wind farm applications will be given a high priority for timely processing and review.

Further, BLM's September 2004 proposal for a permanent wind energy policy is consistent with the foregoing provisions of the Interim Policy. Thus, many of the wind power issues raised before the Commission have recently been reviewed and addressed by the Federal government, and much of such analysis, including the move away from centralized planning and provisions for interim projects, should be included in any future efforts.

IX. Environmental Justice Should be an Objective for Ocean and Coastal Policy.

The Report does not refer to environmental justice as a policy objective. Both the Federal government and many of the States, however, have well-established policies that encourage regulatory agencies to address the disparate impacts of development activities on low-income population area. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," directs Federal agencies to consider environmental justice issues:

> Each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.

Executive Order 12898, 1994. The Environmental Justice Policy of the Massachusetts Executive Office of Environmental Affairs ("Policy") similarly provides as follows:

> [T]argets EOEA resources to service those high-minority/low-income neighborhoods in Massachusetts where the residents are most at risk of being unaware of or unable to participate in environmental decision-making. Working with these EJ Populations, EOEA will take direct action as part of the implementation of this policy to restore degraded natural resources (21E hazardous waste/brownfield sites), to increase access to open space and parks, and to address environmental and health risks associated with existing and potential new sources of pollution….

Environmental Justice Policy of the Executive Office of Environmental Affairs, at 4. The Task Force should be concerned that the current Draft Principles and Policy Recommendations, by failing to incorporate any reference to environmental justice, may inadvertently drive development activities to locations where there would be disparate impacts on minority and low-income populations. If wealthy and powerful interests use their influence to block necessary activities from areas within sight of their waterfront estates (notwithstanding clearly demonstrated public need and benefit and satisfactory consideration of siting alternatives), those activities will, by default, be driven to other locations, which would more likely include environmental justice populations. Therefore, the Report should be supplemented to include environmental justice as a management principle for the ocean and coastal zone.

X. The United States Should Minimize Unnecessary Commercial Disruption.

The United States should be concerned that, by proposing to comprehensively rework a long-established statutory and regulatory framework, it could inadvertently introduce a measure of financial uncertainty that could negatively impact the progress of all commercial activities in or affecting the ocean or coastal zone. In this respect, Cape Wind cites the following cautionary words of Federalist Paper 62:

> [G]reat injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

Federalist Paper 62. The Report could in this regard adversely affect not just offshore energy projects, but all aspects of coastal and ocean commerce, including the recreational boating industry, aquaculture, commercial fishing, waterfront property ownership, commercial real estate development, and the financial lending community.

Notably, when the Massachusetts Ocean Management Tank Force recently issued its Report and Recommendations in March of 2004, it expressly provided that "the recommendations in this report are prospective in nature and will not impact projects already under regulatory review," and further stated that "we neither recommend a moratorium on development and permitting activities, nor want our proposals and uncertainty about policies to have the effect of chilling development." We also note that Section 321 of the pending Energy Policy Bill (S. 2095) includes specific provisions for the interim treatment of those few offshore wind projects that are already under development. The President should similarly avoid an open-ended period of commercial uncertainty by clarifying that any recommendations would be prospective in nature and not disrupt projects already under development and regulatory review.

This seems particularly appropriate in light of the pressing National need for domestic energy resources and the Report's recognition that a shift towards an "ecosystem management" model is a "long-term" proposition that would, if adopted, be implemented in multiple "phases" over an undetermined period of years.

Very truly yours,

Dennis J. Duffy
Vice President of Regulatory Affairs